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# Playing Politics with Shareholder Value: The Case for Applying Fiduciary Law to Corporate Political Donations Post-*Citizens United*

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# PLAYING POLITICS WITH SHAREHOLDER VALUE: THE CASE FOR APPLYING FIDUCIARY LAW TO CORPORATE POLITICAL DONATIONS POST-*CITIZENS UNITED*

**Abstract:** The 2010 midterm elections following the Supreme Court's landmark decision in *Citizens United v. FEC* saw a spike in contributions from outside (non-party) sources: these groups spent over four times as much as any other single midterm election cycle. This phenomenon underscores both the psychological and competitive impact that *Citizens United* undoubtedly had on the political behavior of the American corporation. As more businesses begin to exercise their right to participate in political campaigns, directors and managers must still honor their fiduciary responsibilities to the corporation and its shareholders. Against the backdrop of *Citizens United* and its apparent effects on corporate political spending, this Note explains how fiduciary law could serve as a check on the unbridled discretion enjoyed by corporate leadership to use general treasury funds for purely political ends. Fiduciary duties protect shareholders' investments from managerial self-interest and ensure that corporate leaders make careful, well-informed decisions that are truly in the best interests of the firm. To that end, shareholders could use these fundamental principles of corporate law to promote greater accountability and transparency when corporations become involved in highly contentious political campaigns.

## Introduction

In 1919, two minority shareholders of the Ford Motor Corporation ("the Company") sued Henry Ford—the Company's Chief Executive Officer (CEO) and President—claiming that he was improperly using the company's excess capital to produce cheaper cars and pay his employees better wages.[1] The shareholders were John and Horace Dodge, who together would later become one of Ford's chief competitors in

[1] Dodge v. Ford, 170 N.W. 668, 670–71 (Mich. 1919); *see* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 Va. L. & Bus. Rev. 163, 164–65 (2008) (arguing that the court's language in *Dodge* represents bad law when used to support the idea that the sole purpose of the corporation should be to maximize shareholder wealth).

the automobile industry.[2] Motivated by their short-term interests as shareholders of the Ford Motor Corporation and their long-term interests as Henry Ford's prospective competitors, the Dodge brothers argued that the Company was required to distribute excess capital to its shareholders as dividends, rather than diverting its assets for other purposes.[3] The Michigan Supreme Court agreed, requiring Ford to issue greater dividends to its shareholders.[4]

The court in *Dodge v. Ford* implied that Henry Ford exceeded his authority as president of the firm and dominant member of the board by using massive amounts of corporate funds for purposes other than the promotion of shareholder value.[5] Over ninety years after *Dodge*, this rationale still resonates in American corporate law today.[6] Although modern corporate law rules are extremely deferential to the discretion of corporate management, most courts still require that board deci-

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[2] Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. Rev. 283, 284 (1998) (questioning the dominance of shareholders in the corporate structure and arguing that workers should play greater roles in corporate governance). The Dodge brothers owned approximately ten percent of Ford's entire capital stock; Ford himself owned fifty-eight percent of the Company's stock. *See Dodge*, 170 N.W. at 670–71. A key component of the Dodge brothers' complaint was a statement Ford had made in a Detroit newspaper declaring his true purpose in "reinvesting" Ford's available capital back into the company:

> "My ambition . . . is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business."

*Id.* at 671 (quoting Henry Ford).

[3] *Dodge*, 170 N.W. at 671, 673.

[4] *Id.* at 685.

[5] *Id.* at 684. The *Dodge* court's conclusion is frequently cited in support of the "shareholder primacy" model of corporate law, which regards shareholders' interests in maximizing profits as the ultimate purpose of a corporation. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. Corp. L. 277, 315 (1998) (challenging the prevailing view of the shareholder primacy norm in legal scholarship).

[6] 170 N.W. at 685; *see* Smith, *supra* note 5, at 280 ("The assumption that the shareholder primacy norm is a major factor in the ordinary business decisions of boards of directors of modern, publicly traded corporations is pervasive in modern corporate law scholarship."). Some scholars point out that *Dodge*'s broader holding (that in making business decisions, directors must consider profits alone, to the exclusion of all other constituencies) has been unanimously discarded by contemporary courts. *See* Stout, *supra* note 1, at 166 (observing that since 1978, *Dodge* has been cited by Delaware courts only once—in an unpublished opinion in a case not concerning corporate purpose). These commentators argue that, read properly, *Dodge* stands for the proposition that a corporation's primary purpose is to seek profits, but directors may also consider other interests incidental to the corporation's business operations, such as charitable or humanitarian works. *Id.* at 168; *see, e.g.*, Del. Code Ann. tit. 8, § 122(9) (Supp. 2010); A.P. Smith Mfg. v. Barlow, 98 A.2d 581, 590 (N.J. 1953).

sions be made with the best interests of shareholders in mind.[7] When non-shareholder constituencies[8] cloud a board's judgment, courts have been responsive to shareholders wielding fiduciary law as a legal basis to protect their ownership interest in the corporation.[9]

In January of 2010, the U.S. Supreme Court decided *Citizens United v. FEC*—a case that has attracted significant attention from politicians, academics, and corporate leaders.[10] As one might expect, the focus of the *Citizens United* debate has centered upon the "expressive" aspect of the ruling, and rightfully so.[11] Little, however, has been written about the implications of *Citizens United* on corporate law and what the decision means for the shareholders of American corporations.[12] Regardless of the First Amendment rights that the Court either created or vindicated (depending upon one's perspective), the debate over corporate political speech raises a fundamental corporate law question that hark-

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[7] *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986). In the context of a corporate takeover, corporations' boards are generally required to subordinate all interests to the goal of maximizing the sale price of the company. *Id.* In 1986, in the seminal case of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Supreme Court of Delaware deployed the shareholder primacy norm, stating, "[W]e must conclude that under all the circumstances the directors allowed considerations other than the maximization of shareholder profit to affect their judgment . . . to the ultimate detriment of its shareholders. No such defensive measure can be sustained . . . ." *Id.*

[8] For example, the interests of employees, customers, the general public, or directors.

[9] *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954–55 (Del. 1985). In the takeover context, *see supra* note 7, there is a special concern that a board will act in its own self interest, erecting defensive measures in order to protect its position of power. *Id.* ("Corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders . . . ." (citing Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939))).

[10] 130 S. Ct. 876, 886 (2010). For an excellent commentary on the decision, see Comment, Citizens United v. FEC: *Corporate Political Speech*, 124 Harv. L. Rev. 75, 75–76 (2010). *See also infra* notes 50–84 and accompanying text.

[11] *See* Heather K. Gerken, *The Real Problem with Citizens United*, Yale L. Sch. (Jan. 22, 2010), http://www.law.yale.edu/news/11178.htm. The decision has unquestionable significance as a matter of policy and First Amendment law, *see id.*, but the particular normative debate over whether the case was rightly decided is beyond the scope of this Note. Rather, this Note assumes that *Citizens United* is now the law, and instead offers a view on the new political spending regime through the lens of corporate law and the longstanding tradition of shareholder primacy. *See infra* notes 163–241 and accompanying text.

[12] *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 95 (2010) (focusing on the expressive significance of corporations' political activity and how different voting rules could strike a better balance between the corporate political speech preferences of shareholders and management); Michael R. Siebecker, *A New Discourse Theory of the Firm After* Citizens United, 79 Geo. Wash. L. Rev. 161, 168 (2010) (arguing in favor of a "discourse" theory of the corporate firm in which shareholders have more say in the nomination and election of directors).

ens back to *Dodge*: does donating corporate funds to political campaigns promote shareholder value?[13]

In the wake of the Supreme Court's decision in *Citizens United*, this Note discusses the growing need for greater oversight of directorial discretion when corporate leaders use money from their firms' general treasuries to fund political advocacy groups.[14] Given the Supreme Court's current attitudes on this issue and the lack of adequate alternative remedies, this Note concludes that fiduciary law represents the last line of defense for shareholders in retaining some semblance of control over the political behavior of the American corporation.[15] Through suits based on the fiduciary duty of loyalty and the doctrine of waste, shareholders should be entitled to sue directors for use of the corporation's wealth for what is often a nonbusiness purpose.[16] As with any method of promoting directorial accountability, however, several obstacles stand in the way of these suits' ultimate success, including Delaware's exculpation statute[17] and the managerially-protective standards of the Delaware state courts.[18]

Part I of this Note discusses corporate political speech in the United States, summarizing the Supreme Court's decision in *Citizens United* and examining what it could mean for corporations wishing to provide financial support to political campaigns.[19] Part II outlines the existing state and federal corporate law rules that allow shareholders to participate in corporate political speech decisions, ranging from voting rights

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[13] *See* 170 N.W. at 685; *see also* Stern v. Gen. Electric Co., 837 F. Supp. 72, 77 (S.D.N.Y. 1993), *aff'd*, 23 F.3d 746, 747 (2d Cir. 1994) (granting summary judgment for directors who allegedly wasted corporate assets by creating and administering a political action committee that supported a variety of political candidates); Marsili v. Pac. Gas & Elec. Co., 124 Cal. Rptr. 313, 320–21 (Ct. App. 1975) (concluding that a $10,000 corporate contribution to a group advocating against a ballot measure that would have increased the company's taxes by over $1 million annually was not a gift and did not lack a corporate objective); Adam Winkler, *The Corporation in Election Law*, 32 Loy. L.A. L. Rev. 1243, 1264 (1999).

[14] *See* 130 S. Ct. at 886 (2010); *see infra* notes 163–241 and accompanying text.

[15] *See infra* notes 212–241 and accompanying text.

[16] *See infra* notes 212–241 and accompanying text.

[17] *See* Del. Code Ann. tit. 8, § 102(b)(7) (Supp. 2010). Delaware law allows corporations to include a clause in their charters either limiting or eliminating directors' liability for violation of the duty of care. *Id.* That statutory provision, however, explicitly does not excuse directors from liability for (1) breach of the duty of loyalty, (2) acts or omissions not in good faith, (3) intentional misconduct or knowing violation of law, or (4) transactions in which a director derives an improper personal benefit. *See id.*

[18] *See infra* notes 124–149 and accompanying text.

[19] *See infra* notes 25–84 and accompanying text.

to more drastic remedial tools such as derivative suits.[20] This Part focuses on the law of Delaware—the predominant state of incorporation in the United States—and describes how recent Delaware decisions may influence directorial responsibility throughout the United States.[21] Finally, Part III presents evidence that political donations are frequently not in the best interests of a company and observes that internal mechanisms of corporate participation are currently inadequate to resolve inevitable conflicts between shareholders and management with respect to these spending decisions.[22] As a result, Part III concludes that fiduciary law is an appropriate and much-needed mechanism for ensuring greater accountability to shareholders when directors[23] elect to make corporations active participants in the highly divisive American political arena.[24]

## I. Corporate Political Speech and *Citizens United*

When the Supreme Court expanded First Amendment protections for corporate political speech in *Citizens United* in January 2010, much was written and spoken[25] about the decision.[26] Two years later, the full

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[20] *See infra* notes 85–162 and accompanying text.

[21] *See infra* notes 85–162 and accompanying text.

[22] *See infra* notes 163–241 and accompanying text.

[23] This Note uses the terms "directors" and "management" interchangeably to refer to the universe of corporate leaders who may be responsible for making or contributing to political speech decisions. *See infra* note 201. As will be discussed *infra* notes 154–156 and accompanying text, this may include directors, officers, and other corporate managers not within a company's formal leadership. *See infra* note 201 (discussing the prevalence of American corporations allowing lower-level management to authorize political speech decisions on behalf of a company).

[24] *See infra* notes 163–241 and accompanying text.

[25] *See, e.g.*, President Barack Obama, Report on the State of the Union Delivered to a Joint Session of Congress (Jan. 27, 2010), *in* 156 Cong. Rec. S263, S266–67 (daily ed. Jan. 27, 2010). President Obama delivered perhaps the most prominent criticism of the decision during the State of the Union address, just days after *Citizens United* was decided:

> With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. (Applause.) I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. (Applause.) They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.

*Id.*

[26] *See, e.g.*, Jess Bravin, *Court Kills Limits on Corporate Politicking*, Wall St. J., Jan. 22, 2010, at A1; Adam Liptak, *Justices, 5–4, Reject Corporate Spending Limit*, N.Y. Times, Jan. 21, 2010, at A1; Gerken, *supra* note 11.

implications of *Citizens United* for our democratic system of government and traditional principles of corporate behavior are still not completely apparent.[27] Recent events, however, have revealed the growing entrenchment of corporate participation in the political arena.[28]

### A. *Target Corporation: A Case Study in Corporate Political Speech*

In the summer of 2010, news broke that Target Corporation (Target) had made a $150,000 donation to MN Forward—a Minnesota-based political group that endorsed and paid for ads in support of the Republican candidate for Minnesota Governor, Tom Emmer.[29] The problem for Target, though, was not—strictly speaking—the political affiliation of the candidate whose campaign it supported; rather, it was the candidate's opposition to gay marriage that immediately generated significant antipathy on the part of many (formerly) loyal Target customers.[30]

In response to the negative press, Target's CEO Gregg Steinhafel's principal justification for the donation was that the company was merely supporting an organization (and candidate) that would advance policies consistent with Target's business goals.[31] Many Target customers in

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[27] *See* Vinod K. Aggarwal, *Campaign Spending Now Open for Business*, Harv. Bus. Rev. Blog Network (Aug. 20, 2010, 9:50 AM), http://blogs.hbr.org/cs/2010/08/campaign_spending_now_open_for.html. Indeed, scholars have suggested that the decision was merely one more step in the direction the Court had already begun to move, rather than a new, radical restriction on Congress's ability to limit corporate expenditures. *See* Gerken, *supra* note 11. As one such scholar put it, "Citizens United was just the last nail in the coffin." *Id.*

[28] *See, e.g.*, Patrick Allen, *Tea Party Calls for Duke CEO Jim Rogers' Head*, CNBC (Apr. 5, 2011, 8:38 AM), http://www.cnbc.com/id/42428212/Tea_Party_Calls_for_Duke_CEO_Jim_Rogers_Head; Emily Friedman, *Target, Best Buy Angers Gay Customers by Making Contribution to GOP Candidate*, ABC News (July 28, 2010), http://abcnews.go.com/Business/target-best-buy-fire-campaign-contributions-minnesota-candidate/story?id=11270194.

[29] *See* Friedman, *supra* note 28.

[30] *See id*; *see also* Edward Lotterman, *Real World Economics/Target's Politics May Sink to the Bottom Line*, Real World Econ. (Aug. 1, 2010), http://www.edlotterman.com/2010/08/01/targets-politics-may-sink-to-the-bottom-line/.

[31] *See* Friedman, *supra* note 28. Target's CEO Gregg Steinhafel said that the donation was wholly justified in an email to staffers subsequently reported by ABC News:

> Target has a history of supporting organizations and candidates, on both sides of the aisle, who seek to advance policies aligned with our business objectives, such as job creation and economic growth. . . . It is also important to note that we rarely endorse all advocated positions of organizations or candidates we support, and we do not have a political or social agenda. . . . Let me be very clear, Target's support for the GLBT community is unwavering, and inclusiveness remains a core value of our company . . . .

Minnesota and beyond, however, were not persuaded.[32] They either refused to believe that job growth was truly the motivating concern behind the donation or simply thought that donating corporate money to a group that opposed gay marriage was unacceptable even if it was genuinely aimed at promoting a more favorable economic climate for Target and its shareholders.[33]

Regardless of its true rationale, the donation to MN Forward and its aftermath led to an abundance of bad press for Target.[34] In response, some groups organized formal boycotts of Target stores around the country;[35] other customers ceremoniously tore up their Target credit cards.[36] Although the particular expressions of disapproval varied among the formerly Target faithful, the effect on Target's business was singular: the donation to MN Forward badly tarnished the company's

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*Id.*

[32] *See id.*

[33] *See id.*; *see also* Lotterman, *supra* note 30.

[34] *See, e.g.*, Richard A. Epstein, Citizens United v. FEC*: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 Harv. J.L. & Pub. Pol'y 639, 656–67 (2011) (discussing the dangers posed by corporate political involvement to a firm's business).

> Political statements will win a corporation many enemies—enemies who can then boycott your products. The same political statements may win you some friends, but not friends who will double their purchases just because you have taken a stand they find favorable. Hence, the last thing that you want to do as a corporation is get involved with election campaigns when it is clear that no candidate embodies all the positions—and only those positions—that are ideal for the firm. Entering this swamp presents a real danger, and no sensible corporation should take that risky step.

*Id.*; *see also* Lotterman, *supra* note 30 (describing the donation as a failure of basic marketing principles).

> Avoiding unnecessary public controversy and not taking actions that might compromise one's brand identity are basic principles in marketing. Public relations experts know and teach that consumer reactions to political stances are asymmetric. They tend to repel those who disagree with the stance much more than they attract those who agree.

Lotterman, *supra* note 30.

[35] *See* Sara Yin, *MoveOn.Org Calls for Target Boycott in New Ad (VIDEO)*, Huffington Post (Aug. 17, 2010), http://www.huffingtonpost.com/2010/08/17/boycott-target-commercial_n_684815.html?view=print (discussing one progressive group's attempt to organize a boycott of Target by circulating a petition—with over 260,000 signatures as of August 17, 2010—from consumers vowing not to shop at Target stores).

[36] *See* Friedman, *supra* note 28 (describing one customer's decision to tell her local Target store manager that she could not shop there anymore and to cut up her Target Visa card in response to learning of the $150,000 donation to MN Forward).

public image, and its sales reflected this reality.[37] To make matters worse for Target, Tom Emmer—the candidate backed by MN Forward—lost the Minnesota gubernatorial election by a mere 8000 votes in the November 2010 election.[38]

On August 5, 2010, Steinhafel issued a letter to company employees formally apologizing for the adverse effects of the company's donation.[39] Target's CEO reiterated his firm belief that "a business climate conducive to growth is critical to [Target's] future," but admitted failure in not foreseeing Target's employees' and customers' negative reactions to the donation.[40] Yet, the most revealing part of Steinhafel's statement was a reference to a "strategic review and analysis of [Target's] decision-making process for financial contributions in the public policy arena."[41] Without a doubt, this reassurance was directed, in part, toward reclaiming the loyalty of Target's scorned customers and employees.[42] But ultimately, Steinhafel's promise to reconsider Target's political advocacy policies was aimed at the company's investors—those keenly interested in knowing how Target's management would ensure that a similar public relations disaster would never recur.[43]

Target's ill-advised donation damaged the company in many ways, but from a corporate law (and shareholder) perspective, the greatest consequence of all was its harm to the company's value.[44] Not only did the donation carry a high risk of igniting public backlash, but objec-

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[37] Tom Webb, *Has Emmer Donation Cost Target on Stock Market?*, St. Paul Pioneer Press, Aug. 4, 2010, at A5 (discussing Target's $1.3 billion loss in stock market capitalization, a 3.5 percent decline in share price between the morning of July 27—when news broke of the company's donation to MN Forward—and mid-August).

[38] *See* Brian Montopoli, *Republican Tom Emmer Concedes Minnesota Governor's Race*, CBS News (Dec. 8, 2010, 2:26 PM), http://www.cbsnews.com/8301-503544_162-20025030-503544.html.

[39] *See* Tom Scheck, *Target CEO Apologizes for Donation to MN Forward*, MPRNews (Aug. 5, 2010, 12:58 PM), http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2010/08/target_ceo_apol.shtml.

[40] *Id.*

[41] *See id.*

[42] *See id.*

[43] *See* Tom Hamburger & Jennifer Martinez, *Target Feels Backlash from Shareholders*, L.A. Times (Aug. 19, 2010), http://articles.latimes.com/2010/aug/19/nation/la-na-target-shareholders-20100820 (discussing the demands levied against the Target board by shareholders seeking to revamp the process by which Target decides whether to make donations to political campaigns).

[44] Hamburger & Martinez, *supra* note 43; Webb, *supra* note 37; *see also* Allen, *supra* note 28 (discussing the recent backlash against the CEO of Duke Energy from Tea Party group members for guaranteeing the 2012 Democratic National Convention a $10 million "line of credit" shortly after it decided to hold the Convention in Charlotte, North Carolina—the Duke Energy headquarters).

tively speaking, the donation was also a gamble in its own right.[45] If Emmer had ultimately been elected Governor of Minnesota, Target would have suffered in the court of public opinion, but would (theoretically) have benefited economically under the Republican's leadership.[46] The realized alternative, however, carried the same public backlash, yet failed to provide an advantageous setting for Target's economic growth.[47] Framed in this way, the possible benefits of making the donation seem vastly outweighed by the significant potential for harm.[48] Nevertheless, after choosing such a potentially disastrous course for the company, Target's shareholders must ask themselves whether their leadership learned a lesson from the ordeal and, if not, whether continued investment in the firm is wise.[49]

### B. *Corporate Political Spending Post-*Citizens United

As the preceding look at Target's recent foray into the American political sphere demonstrates, spending corporate funds on campaigns can be a risky endeavor for directors and shareholders alike.[50] But in the past century, criticism of corporate political spending has focused largely on the harm that unbridled donations would inflict on the public, rather than the damage a corporation might inflict on itself.[51] Indeed, corporations wishing to support political campaigns are subject to extensive regulation and reporting requirements, and even outright

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[45] *See* Friedman, *supra* note 28.

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See* Hamburger & Martinez, *supra* note 43.

[50] *See id.* (discussing institutional investors' demands that corporations "consider how contributions will affect the company's public image, business sales and profitability, and whether a candidate espouses policies that conflict with the company's values"). Calls from shareholders for greater accountability are the natural consequences of management making campaign contribution decisions without adequately vetting the candidates. *See id.* Powerful shareholders recognize the need for greater oversight in this area and are trying to protect themselves against the harmful effects of these ill-advised decisions. *See id.*

[51] *See, e.g.*, Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990). As Justice Thurgood Marshall—writing for the majority of the U.S. Supreme Court in its 1990 decision *Austin v. Michigan State Chamber of Commerce*—wrote, a major concern surrounding corporate political donations is "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* In other words, corporations that receive privileges from the state (such as limited liability and perpetual existence) are uniquely able to accumulate wealth; therefore, there is a serious concern that corporations will use those advantages to influence the political process in a way that elevates their interests at the expense of individual citizens. *See id.*

bans in some instances.[52] Although the Supreme Court has addressed the constitutional implications of restricting corporate political spending on the federal and state level many times over the past century,[53] this Section focuses on the specific changes since the Court's ruling in *Citizens United* to better understand how that case may affect corporate political behavior in the future.[54]

To begin, a brief discussion of the factual and legal framework of the case is warranted to inform the inquiry into the appropriate legal response that follows.[55] Citizens United is a non-profit corporation with an annual budget of approximately $12 million, funded primarily by donations from individuals and, to a lesser extent, donations from for-profit corporations.[56] In January 2008, as the primary season leading up to the presidential election began, Citizens United produced and released a ninety-minute film entitled *Hillary*, criticizing Senator Hillary Clinton, a Democratic candidate for President.[57] As part of its plan to distribute the film, Citizens United sought to make *Hillary* available

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[52] *See, e.g.*, 2 U.S.C. § 434(f)(1) (2006) (requiring any person who spends more than $10,000 on electioneering communications within a calendar year to file a disclosure statement with the Federal Election Commission (FEC)); *id.* § 441b (banning all direct corporate contributions to candidates); *see also Citizens United*, 130 S. Ct. at 913–14 (upholding the constitutionality of the disclaimer and disclosure restrictions of the Bipartisan Campaign Reform Act of 2002 as applied to Citizens United's video, *Hillary*).

[53] *See, e.g.*, *Citizens United*, 130 S. Ct. at 913–14; McConnell v. FEC, 540 U.S. 93, 209 (2003) (upholding a federal law prohibiting corporations and unions from using their general treasury funds to finance "electioneering communications"); *Austin*, 494 U.S. at 660 (upholding a Michigan campaign finance law requiring corporations to make all independent political expenditures through a separate fund comprised of money raised specifically for political purposes, rather than from a corporation's general treasury); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978) (striking down a state statute that prevented corporations from making political contributions directed at influencing the outcome of ballot measures). In many of these cases, the Court has refused to enforce categorical bans on corporate political speech, while showing greater willingness to uphold lesser restrictions such as reporting or disclosure requirements. *See, e.g.*, *Citizens United*, 130 S. Ct. at 897 ("The law before us is an outright ban, backed by criminal sanctions."); *Bellotti*, 435 U.S. at 776. In *First National Bank of Boston v. Bellotti*, Justice Lewis Powell, writing for the majority, observed, "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [section] 8 abridges expression that the First Amendment was meant to protect. We hold that it does." *Id.*

[54] *See* 130 S. Ct. at 913; Gerken, *supra* note 11 (arguing, in the greater context of the Court's recent jurisprudence, that the *Citizens United* decision was merely one step in the direction the Court had been heading and that its greater significance was its refusal to define "corruption" as expansively as it had previously; *see also Citizens United*, 130 S. Ct. at 910 ("[I]ngratiation and access . . . are not corruption.").

[55] *See infra* notes 163–241 and accompanying text.

[56] *Citizens United*, 130 S. Ct. at 886–87.

[57] *Id.* at 887; *see also* Comment, *supra* note 10, at 76.

through a video-on-demand service provided by certain cable companies.[58]

At the time, federal law prohibited corporations and unions from directly contributing to political candidates' campaigns or from making independent expenditures advocating a candidate's election or defeat through any form of media.[59] The Bipartisan Campaign Reform Act of 2002 (BCRA or, as it is also known, McCain-Feingold) amended this law to prohibit any "election communication," defined as "any broadcast, cable, or satellite communication" that refers to a political candidate and is released within thirty days of a primary or sixty days of a general election.[60] Citizens United wanted to release *Hillary* through on-demand cable television services within thirty days of the 2008 Democratic primaries, but were concerned that, under McCain-Feingold, it would be subject to civil and criminal penalties.[61]

Instead, Citizens United filed suit for declaratory and injunctive relief against the Federal Election Commission (FEC),[62] and the Supreme Court ultimately heard the case.[63] Writing for the majority, Justice Anthony Kennedy concluded that, even though corporations could speak through political action committees (PACs), 2 U.S.C. § 441b's restrictions on corporate, independent expenditures constituted a full ban on corporate speech and was therefore unconstitutional.[64] As a partial justification for the decision, Justice Kennedy noted that improved disclosure requirements reduced the need for more restrictive

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[58] *Citizens United*, 130 S. Ct. at 887.

[59] *Id.*; *see also* 2 U.S.C. § 441b (2006).

[60] 2 U.S.C. §§ 434(f)(3)(A), 441b(b)(2); *Citizens United*, 130 S. Ct. at 887.

[61] *See* 2 U.S.C. §§ 437g, 441b; *Citizens United*, 130 S. Ct. at 888.

[62] *Citizens United*, 130 S. Ct. at 888. Citizens United argued that § 441b was unconstitutional as applied to *Hillary* and that BCRA's disclaimer and disclosure requirements were similarly unconstitutional. *Id.*

[63] *Id.* First, the District Court denied Citizens United's motion for a preliminary injunction, granting summary judgment in favor of the FEC. Citizens United v. FEC, Civil Action No. 07-2240, 2008 WL 2788753, at *1 (D.D.C. July 18, 2008), *aff'd in part, rev'd in part, Citizens United*, 130 S. Ct. 875. Next, the Supreme Court noted probable jurisdiction and the case was reargued, followed by supplemental briefing on whether the Court should overrule its 1990 decision in *Austin* and parts of its 2003 decision in *McConnell*. *Citizens United*, 130 S. Ct. at 888; Comment, *supra* note 10, at 78; *see McConnell*, 540 U.S. at 209 (upholding a federal law prohibiting corporations and unions from using their general treasury funds to finance "electioneering communications"); *Austin*, 494 U.S. at 668–89 (upholding a Michigan campaign finance law requiring corporations to make all independent political expenditures through a separate fund comprised of money raised specifically for political purposes, rather than from a corporation's general treasury).

[64] *Citizens United*, 130 S. Ct. at 913. The court also overruled *McConnell*, which upheld section 203 of BCRA's extension of section 441b's restrictions on corporate independent expenditures. *Id.*; *McConnell*, 540 U.S. at 209.

laws on corporate expenditures that may have been more pressing at the time McCain-Feingold was enacted.[65]

In the years following *Citizens United*, commentators have debated how corporate political behavior might change as a result of the decision.[66] On its face, the holding appears to be a relatively modest expansion of corporations' First Amendment rights: corporations still may not donate directly to candidates' campaigns and must adhere to FEC disclosure rules.[67] Beyond its black letter holding, however, *Citizens United* provides clear evidence of the Court's current views on corporate political speech and might signal even further erosion of limits on that speech in the near future.[68]

After the decision was handed down, evidence has begun to accumulate showing that total spending connected to political campaigns was growing exponentially and confirming many commentators' predictions that *Citizens United*'s impact on corporate political spending would be significant.[69] After the smoke cleared following the midterm elections of 2010, statistics strongly suggested that political spending in the United States was, indeed, on the rise.[70] Outside groups[71] contrib-

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[65] *Citizens United*, 130 S. Ct. at 916.

[66] *See, e.g.*, Bebchuk & Jackson, *supra* note 12, at 95; Donald B. Tobin, *CEOs Shouldn't Use Corporate Treasury as Personal Political Piggy Bank*, ROLL CALL (Nov. 1, 2010, 12:07 PM), http://www.rollcall.com/news/-51140-1.html.

[67] *See* Comment, *supra* note 10, at 81.

[68] *See* Gerken, *supra* note 11 (explaining that the Court's conception of "corruption" may only include "quid pro quo" corruption—a much narrower definition than that adopted in the past that would significantly limit Congress in how and when it could regulate corporate political expenditures).

[69] *See* Michael Beckel & Megan R. Wilson, *BREAKING: Election 2010 Outside Political Spending Officially Eclipses Such Expenditures From 2004 Cycle*, CENTER FOR RESPONSIVE POL. (Oct. 28, 2010, 1:43 pm), http://www.opensecrets.org/news/2010/10/breaking-outside-spending-this-seas.html. The Center for Responsive Politics reports that outside groups (excluding party committees) spent nearly $305 million during the 2010 midterm elections to produce and broadcast advertisements, make phone calls, and distribute literature. *2010 Outside Spending*, CENTER FOR RESPONSIVE POL., http://www.opensecrets.org/outsidespending/index.php?cycle=2010&view=A&chart=N (last visited Feb. 20, 2012). The 2010 total eclipsed all prior election cycles, including the 2008 elections, featuring a close presidential race between Barack Obama and John McCain. *See id.*

[70] *See 2010 Outside Spending*, *supra* note 69.

[71] "Outside groups" here refers to groups not affiliated directly with a candidate or political party (for example, the U.S. Chamber of Commerce is a prominent outside group). *2010 Outside Spending*, *supra* note 69. As might be expected, party committees led the way in spending in 2010; the Democratic and Republican Congressional and Senatorial Campaigns were four of the top six contributors for the election cycle (the two outside groups were the U.S. Chamber of Commerce and the American Action Network). *See 2010 Outside Spending, by Groups*, CENTER FOR RESPONSIVE POL., http://www.opensecrets.org/outside spending/summ.php?cycle=2010&chrt=V&disp=O&type=A (last visited Feb. 20, 2012).

uted more money to the 2010 midterm elections than they did during both the 2004 and 2008 presidential election cycles, each of which featured a hard-fought presidential race.[72] Not only was the nearly $305 million total the most ever spent by outside groups on a single midterm election, it was more than four times the amount spent in the next-highest-paying midterm election cycle—$69 million in the 2006 Congressional elections.[73]

Furthermore, outside groups have been increasingly less willing in recent years to disclose their contributions to political campaigns.[74] According to the Center for Responsive Politics, outside groups supporting candidates in the 2010 midterm elections disclosed the sources of their funding at the lowest rate in twenty years.[75] In 2004, by contrast, ninety-six percent of these groups provided full disclosure of these sources.[76] Since that time, this number fell to seventy percent in 2008 and a mere fifty-three percent in 2010.[77] In the last midterm elections, nearly forty-four percent of outside groups provided no disclosure whatsoever as to the source of their funding, and the remaining groups provided only partial disclosure.[78]

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[72] *See 2010 Outside Spending*, *supra* note 69.

[73] *See id.* Furthermore, between 2004 and 2008 (two presidential election years), non-committee spending increased by approximately 50%, from roughly $200 million to $302 million. *See id.* In contrast, spending in the 2010 midterm elections (nearly $305 million) was up by more than 340% from spending in 2006 (just under $69 million). *See id.* These statistics do not necessarily evidence a causal relationship between the Supreme Court's decision in *Citizens United* and greater political contributions by American corporations, but the timing of this marked increase in outside spending in 2010 is compelling nonetheless. *See id.*

[74] *See* Megan R. Wilson, *Who's Buying This Election? Close to Half the Money Fueling Outside Ads Comes from Undisclosed Donors*, CENTER FOR RESPONSIVE POL. (Nov. 2, 2010, 6:09 PM), http://www.opensecrets.org/news/2010/11/whos-buying-this-election.html; *2010 Outside Spending*, *supra* note 69.

[75] *See 2010 Outside Spending*, *supra* note 69.

[76] *See id.*

[77] *See id.* A minority of organizations provide what the Center for Responsive Politics refers to as "some disclosure," but the proportion of these groups has been consistently small since 1990. *See id.* Organizations providing some disclosure were at their highest in 2006 at 6.1%, but decreased to approximately 3.1% in 2010. *See id.* The prevailing practices, therefore, seem to either be full disclosure or no disclosure whatsoever, with the percentage of groups in each of these two categories equalizing over the past four years. *See id.*

[78] *See id.* Non-profit organizations classified as 501(c) groups under the U.S. tax code are not required to disclose the sources of their donations. *See* Wilson, *supra* note 74. In contrast, non-profits affiliated with political groups such as political action committees (PACs) must disclose their donor lists. *See id.* One of the largest and most financially involved 501(c) groups in the 2010 midterm elections was the U.S. Chamber of Commerce ("the Chamber"), which ranked fourth in total spending (about $33 million), behind only the Democratic Congressional Campaign Committee (about $66 million), the National

During the lead up to the 2012 elections, however, this trend has reversed, as over ninety-three percent of outside groups have provided full disclosure of the sources of their donations.[79] The apparent reason for this marked departure seems to be the rise of so-called "Super PACs,"[80] which are permitted to raise and spend unlimited funds on independent expenditures, but are required to periodically disclose their donors to the FEC.[81] Super PACs have been the dominant organizational form for conducting political advocacy in the months leading up to the 2012 Presidential election, and as such, the full disclosure rate has nearly doubled since 2010.[82]

Ultimately, the real significance of *Citizens United*—and the extent to which corporations will be emboldened by it to become more active in political endeavors—will continue to unveil itself in the years to come.[83] If, as many expect, corporations begin to occupy a greater space in our nation's political discourse, a legitimate question arises as to how this activity will comport with the purpose of the corporation and the fiduciary obligations held by directors as representatives of shareholder interests.[84]

## II. American Corporate Law Rules Governing Shareholder Involvement in Political Speech Decisions

Shareholders of U.S. corporations may express dissatisfaction with a corporation's political speech decisions in one of two general ways: (1) through internal mechanisms of corporate governance and (2) through external legal remedies available to them when management violates

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Republican Congressional Committee (about $46 million), and the Democratic Senatorial Campaign Committee (about $41 million). *See 2010 Outside Spending, by Groups*, *supra* note 71. The Chamber outspent the National Republican Senatorial Committee (just under $26 million), which finished sixth behind the Chamber and the American Action Network (about $26 million), in addition to the three organizations listed above. *See id.*

[79] *Outside Spending by Disclosure, Excluding Party Committees*, Center for Responsive Pol., http://www.opensecrets.org/outsidespending/ (last visited Feb. 20, 2012) [hereinafter *2012 Outside Spending by Disclosure*].

[80] As of late February 2012, Super PACs were responsible for $51 million of the nearly $60 million (85%) spent by nonparty outside groups in the months leading up to the 2012 Presidential election. *Outside Spending*, Center for Responsive Pol., http://www.opensecrets.org/outsidespending/ (last visited Feb. 20, 2012) [hereinafter *2012 Outside Spending*].

[81] *Super PACs*, Center for Responsive Pol., http://www.opensecrets.org/pacs/superpacs.php?cycle=2012 (last visited Feb. 20, 2012). Specifically, Super PACs are required to report the sources of their donations on a monthly or quarterly basis, whichever the organization chooses. *Id.*

[82] *2012 Outside Spending by Disclosure*, *supra* note 79.

[83] *See* Bebchuk & Jackson, *supra* note 12, at 85.

[84] *See id.* at 83, 93.

the fiduciary duties owed to shareholders.[85] The former class of remedies allows shareholders, albeit in somewhat circumscribed ways, to voice their concerns directly with management.[86] External legal remedies, on the other hand, represent a "last resort" for shareholders when the procedures of corporate democracy have failed them and they must rely on state corporate law to redress their concerns.[87] Section A of this Part discusses a shareholder's options when seeking to change a corporation's political speech policies from within and highlights the attendant benefits and limitations of this course.[88] Section B delves into state fiduciary law, with an emphasis on the law of Delaware—the most influential jurisdiction for corporate law in the United States.[89]

### A. *Internal Pathways for Shareholders to Control Corporate Political Speech*

Shareholders of a corporation may avail themselves of several avenues to influence that company's political speech decisions without resorting to legal actions; they may submit proposals aimed at changing these decisions,[90] exercise their right to vote on various matters at the corporation's annual meeting (including the election or removal of directors),[91] and—if all else fails—sell their shares.[92]

First, the Securities and Exchange Commission (SEC) has declared that under certain circumstances, shareholders may submit proposals to corporations for consideration and, if accepted, these proposals will be voted on at the annual shareholder meeting.[93] In order to be eligible to submit a proposal, a shareholder must have continuously owned at least $2000, or one percent of a company's securities for one full year, through the date of the meeting.[94] Furthermore, any individual shareholder may only submit one proposal per meeting, and the pro-

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[85] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794–95 (1978); Bebchuk & Jackson, *supra* note 12, at 86 (citing Citizens United v. FEC, 130 S. Ct. 876, 911 (2010)).

[86] *See* Bebchuk & Jackson, *supra* note 12, at 86.

[87] *See Bellotti*, 435 U.S. at 795.

[88] *See infra* notes 90–113 and accompanying text.

[89] *See infra* notes 114–162 and accompanying text.

[90] *See* SEC Shareholder Proposals Rule, 17 C.F.R. § 240.14a-8 (2011).

[91] *See* Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 451 (2008).

[92] KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 52 (2006); *see also Citizens United*, 130 S. Ct. at 911 ("There is, furthermore, little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"(quoting *Bellotti*, 435 U.S. at 794)).

[93] 17 C.F.R. § 240.14a-8 (2011).

[94] *Id.* The proposing shareholder must also be a "registered holder" of the securities. *Id.*

posal may not exceed five hundred words.[95] Even if these procedural requirements are met, a board may exclude a shareholder proposal from consideration at its annual meeting for a variety of reasons, including if the proposal concerns a matter relating to a company's ordinary business operations.[96]

Some scholars have argued that proposals aimed at curbing or eliminating political contributions would most likely fail thanks to the broad exclusionary provisions adopted by the SEC.[97] Specifically, proposals concerning political speech could very well be considered "relating to the company's ordinary business operations" and therefore not a proper subject for shareholder involvement.[98] Furthermore, even if

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[95] *Id.*

[96] *Id.* The rationale behind this particular exclusion is that shareholders have delegated the responsibility for the day-to-day operations of the company to the management; to that end, shareholders should not be entitled to use the proxy as a means of interfering with ordinary business decisions entrusted to a company's capable leadership. *See id.*

A properly submitted proposal may be excluded if: (1) it is not a proper subject for action by shareholders under the laws of the state of incorporation, (2) it would cause the company to violate any state, federal, or foreign law, (3) it would violate the SEC's proxy rules (including Rule 14a-9, prohibiting issuance of materially false or misleading statements), (4) it concerns a personal claim or grievance against the company and is aimed at obtaining a personal benefit that is not shared by the shareholders at large, (5) it is irrelevant to the company's principal business operations, (6) the company would lack the authority to adopt the proposal, (7) it deals with a matter relating to the company's ordinary business operations, (8) it relates to nomination or election of directors, (9) it conflicts with one of the company's own proposals submitted to shareholders, (10) it has already been substantially implemented, (11) it substantially duplicates another proposal that will be included in the proxy materials for the same meeting, (12) it deals substantially with the same subject matter as another proposal that failed in previous years, or (13) it relates to specific amounts of cash or stock dividends. *Id.*

[97] *See* Bebchuk & Jackson, *supra* note 12, at 87 (arguing that such proposals would be subject to the same rules as ordinary business decisions, therefore effectively eliminating any role shareholders might play in shaping corporate policy in the political arena); Katrina Kuh, *Anti-Green ($$) Shareholder Resolutions—A Remedy to* Citizens United?, PrawfsBlawg (May 11, 2010, 1:11 PM), http://prawfsblawg.blogs.com/prawfsblawg/2010/05/antigreen-shareholder-resolutions-a-remedy-to-citizens-united-.html (observing that proposals could be excluded because they do not relate to the principal business operations of the company or, alternatively, because they account for less than five percent of its total assets at the end of the most recent fiscal year).

[98] *See* 17 C.F.R. § 240.14a-8(i)(7) (2011); Bebchuk & Jackson, *supra* note 12, at 87. Interestingly, the SEC recently issued a no-action letter indicating that it may have reversed its previously held policy of classifying corporate political contributions as subject to exclusion as "ordinary business decisions." *See* The Home Depot, Inc., SEC No-Action Letter, (Mar. 25, 2011), *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf. If shareholder proposals aimed at restricting political involvement are no longer subject to exclusion by a company's board, this could substantially increase shareholder participation in—and oversight over—these important decisions. *See id.*

such decisions were deemed outside the ordinary business of the corporation and not excluded by the board, spending caps or other restrictions on political donations would most likely take the form of "recommended" action and would thus be nonbinding on the board.[99]

Second, shareholders may exercise their right to vote on matters presented to them at a corporation's annual meeting.[100] As might be inferred from the familiar phrase "one share, one vote," each shareholder of a corporation is typically entitled to one vote for every share[101] of the company that he or she owns.[102] Today, many shareholders' portfolios are widely diversified and attendance at the annual meetings for every company in which shareholders own stock is functionally impossible.[103] As a result, voting is dominated by the proxy process in which shareholders assign their voting rights to an intermediary who represents their interests at a company's annual meeting.[104] Of course, a shareholder's right to voice concerns with a corporation's political involvement assumes that proposals involving political contributions may not be excluded by the board;[105] given the low success rate of these proposals even in reaching a vote, use of the proxy is, at best, an extremely limited tool for shareholders to voice concerns about the wisdom of a corporation's political involvement.[106]

Finally, shareholders may exercise control over corporate decision making with regard to political campaign donations by selling their shares, or "voting with their feet."[107] If enough shareholders express

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[99] *See* Bebchuk & Jackson, *supra* note 12, at 87–88. In 2004, shareholders of American International Group (AIG) submitted a proposal to the board requesting that it prepare a report containing AIG's policies regarding political contributions, including "a business rationale for each of AIG's political contributions" and "the identity of the person . . . involved in making decisions with respect to AIG's political contributions." Am. Int'l Grp., Inc., SEC No-Action Letter, 2004 WL 346068, at *1 (Feb. 19, 2004). In response to the board's request to omit the proposal, the SEC found that the proposal was not related to the company's ordinary business operations within the meaning of its regulations and thus required AIG to submit the proposal to its shareholders. *See id.*

[100] *See* Hayden & Bodie, *supra* note 91, at 463.

[101] It should be noted that today, not all "shares" carry single voting power. For example, owners of "preferred stock" have no voting rights unless a triggering event occurs. *See id.* at 482. But once that event occurs, each preferred share may have multiple "common share" votes in order to compensate for the occurrence of the triggering event (such as a failure to pay dividends). *See id.*

[102] *See id.* at 463.

[103] *See* Greenfield, *supra* note 92, at 25.

[104] *See* Hayden & Bodie, *supra* note 91, at 460.

[105] *See supra* notes 93–99 and accompanying text.

[106] *See* Bebchuk & Jackson, *supra* note 12, at 88.

[107] *See* Greenfield, *supra* note 92, at 239.

their disapproval of a board's unsuccessful entry into the political arena by selling their shares, the stock price of the company will fall; this collective action may serve as a corrective force and prevent undesirable business decisions.[108] This was likely the case for Target, as its share price declined by 3.5 percent in the months following public disclosure of its donation to MN Forward.[109] There are numerous drawbacks to this option, however, not the least of which is that the shareholder who sells shares never enjoys the benefits that accompany a corporation's improved leadership.[110]

Although these internal pathways may, at the outset, appear to be the most direct and efficient way to influence a corporation's political spending policies, a closer examination of how these internal corporate law rules function in practice (taken up in Part III) reveals how hollow they often are.[111] Some scholars advocate the expansion of shareholder voting rights in order to provide investors with a voice when it comes to using corporate funds for political purposes.[112] But until that happens, shareholders are limited to the internal processes discussed above to express their dissatisfaction with corporate leadership.[113]

### B. *Fiduciary Duties, Derivative Suits, and the Law of Delaware*

Another more drastic remedial tool for shareholders is filing a lawsuit against the company's directors and officers.[114] These suits are based on the fiduciary duties owed to shareholders by the directors and officers of the corporation.[115] These duties flow from the imbalance of control between management and shareholders; fiduciary duties pro-

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[108] *See id.*

[109] Webb, *supra* note 37.

[110] *See* Greenfield, *supra* note 92, at 239.

[111] *See infra* notes 190–211 and accompanying text.

[112] *See* Bebchuk & Jackson, *supra* note 12, at 97.

[113] *See id.* at 117.

[114] *See Bellotti*, 435 U.S. at 795; *see also* Gantler v. Stephens, 965 A.2d 695, 708–09 nn.36–37 (Del. 2009) (holding "explicitly" that officers of corporations owe the same fiduciary duties of care and loyalty to shareholders as do directors). The Delaware Supreme Court has observed that, although officers and directors of Delaware corporations owe identical fiduciary duties to shareholders, the consequences of breach of fiduciary duty may be different for these two groups. *See Gantler*, 965 A.2d. at 709 n.37. Delaware state law permits corporations to include a provision in its certificate of incorporation exculpating its board of directors from liability from breaches of the duty of care; therefore, the Court implied that, when a corporation has exculpated its directors from liability, identical breaches of the duty of care by directors and officers could lead to liability for the latter, but not for the former. *See id.*

[115] *See* Greenfield, *supra* note 92, at 135.

vide assurance to shareholders that directors will act competently and in shareholders' best interests (duty of care), and will not take advantage of their position of power for personal gain (duty of loyalty).[116] The strength of these duties, however, is tempered by the business judgment rule—a doctrine that provides management with wide latitude in conducting the day-to-day business of the corporation.[117]

This Section addresses areas of fiduciary law that could provide shareholders with a legal basis for bringing derivative suits when management ostensibly abuses its discretion in designating corporate funds for political purposes.[118] In this factual context, shareholders could base their claims on the doctrine of waste (a component of the broader duty of care) or the duty of loyalty.[119]

This discussion focuses on Delaware corporate law, which has been by far the most influential state corporate law over the past century.[120]

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[116] *See* LAWRENCE E. MITCHELL & DALIA TSUK MITCHELL, CORPORATIONS: CASES AND MATERIALS 136–37 (2006) (providing an overview of the fiduciary duties of care and loyalty). Speaking at a recent symposium on corporate law, Justice Carolyn Berger of the Delaware Supreme Court summarized the state of fiduciary law in Delaware: "We have the duty of care, the duty of loyalty, enhanced scrutiny [in the context of corporate takeovers], and the business judgment rule." Carolyn Berger, *Good Faith After* Disney*: Justice Berger's Closing Discussion*, 55 N.Y.L. SCH. L. REV. 659, 663 (2010). Although it was unclear for some time whether the courts had established a third, independent fiduciary duty requiring directors to act in good faith, the latest opinions from the Delaware Supreme Court have cast that position in doubt. *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 244 (Del. 2009) ("[T]his record clearly establishes that the Lyondell directors did not breach their duty of loyalty by failing to act in good faith."); Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("[T]he obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only the latter two duties, where violated, may directly result in liability . . . ."); Lawrence Cunningham, *Delaware Back to Sturdy Doctrine; Good Faith in Coma*, CONCURRING OPINIONS (Mar. 31, 2009, 10:28 AM), http://www.concurringopinions.com/archives/2009/03/delaware_back_t.html (commenting that the alleged duty of good faith is currently neither dead nor alive after the court's opinion in *Lyondell*).

[117] *See* Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982).

[118] *See Bellotti*, 435 U.S. at 795; Epstein, *supra* not 34, at 656 ("[I]t is an open question whether particular campaign contributions could be a violation of [board members'] duties on the ground that they deal with matters unrelated to the interests of the corporation . . . .").

[119] *See infra* notes 136–149 and accompanying text.

[120] *See* GREENFIELD, *supra* note 92, at 107. The statistics regarding Delaware's dominance in the area of corporate law are staggering:

> Delaware has a population less than one-third of one percent of the nation, but it is the state of incorporation of over 50 percent of U.S. public companies and 60 percent of the Fortune 500. . . . Over 300,000 companies are incorporated there, and 300 of the Fortune 500. The state with the second-most of the Fortune 500, New York, has only 25. In fact, so many companies incorporate in Delaware that incorporation and franchise fees provide one-quarter of its total state revenues.

This phenomenon is largely due to the "internal affairs" doctrine, which provides that the rules governing a corporation's business affairs are dictated by the state in which the corporation is chartered.[121] As such, because so many American corporations call Delaware "home,"[122] its corporate law governs companies that are headquartered and doing business in all fifty states; thus, Delaware's corporate law rules are much more important than those of any other state.[123]

### 1. The Business Judgment Rule

Any discussion of the fiduciary obligations owed by corporate management to shareholders must start with a bedrock principle: the business judgment rule.[124] This deferential standard entitles directors of a corporation to considerable discretion in making decisions regarding the day-to-day operation of a company.[125] In effect, the rule insulates management from shareholder suits for poor business decisions; unless shareholders can make a showing of bad faith or some other extreme, fraudulent behavior, the business judgment rule usually precludes fiduciary claims.[126] Even if this presumption in favor of man-

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*Id.* at 107–08.

[121] *See id.* at 108.

[122] This phenomenon is somewhat misleading, however, because the internal affairs doctrine allows companies that have little or no meaningful attachment to a state to incorporate there and benefit from its corporate law rules. *Id.* This is precisely the case in Delaware: despite its enormous market share of incorporation for the largest public companies in the United States, "[o]nly two of the 300 Fortune 500 companies incorporated in Delaware—DuPont and MBNA—have their headquarters actually sited in the state." *See id.*

[123] *See id.*

[124] *See Joy*, 692 F.2d at 885; *see also* Mitchell & Mitchell, *supra* note 116, at 138–46 (providing a thorough overview of the business judgment rule and several of its policy rationales).

[125] *See Joy*, 692 F.2d at 885. The Delaware courts have made it clear, however, that certain situations do not warrant strict application of the business judgment rule. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954–55 (Del. 1985). For example, in the context of "poison pills," or defensive measures adopted in response to takeover bids, the Delaware Supreme Court requires an additional showing before the protections of the business judgment rule will apply. *Id.* at 954. "Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred." *Id.*

[126] Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 812 (App. Div. 1976).

> "In actions by stockholders, which assail the acts of their directors or trustees, courts will not interfere unless the powers have been illegally or unconscientiously executed; or unless it be made to appear that the acts were fraudulent or collusive, and destructive of the rights of the stockholders. Mere errors of

agement is successfully rebutted by shareholder plaintiffs, the inquiry does not end there.[127] Rather, the burden then shifts to the directors to show that the decision in question was "entirely fair to the corporation and its shareholders."[128] Therefore, shareholders will only prevail when they rebut the business judgment rule and the directors fail to show that a decision was fair.[129]

Several rationales have been advanced in support of the rule.[130] First, shareholders voluntarily assume a certain degree of risk that managers will make poor business decisions.[131] Second, business decisions should not be evaluated after the fact by courts.[132] Finally, arguably the acceptance of, and desire for, risk is critically important to a company's profitability, and risky decisions should not be deterred through shareholder suits.[133]

Although political donations may not appear related to a corporation's day-to-day operations, the reach of the business judgment rule is extremely broad; for this reason, rebutting the rule is the most significant obstacle to a shareholder suit.[134] As Target learned firsthand, donating general treasury funds to a political campaign can be an extremely risky endeavor; nevertheless, in most cases, the business

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> judgment are not sufficient as grounds for equity interference, for the powers of those entrusted with corporate management are largely discretionary."

*Id.* (quoting Leslie v. Lorillard, 18 N.E. 363, 365 (N.Y. 1888)).

[127] *In re* The Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006).

[128] *Id.*

[129] *See id.*

[130] *Joy*, 692 F.2d at 885–86.

[131] *Id.* at 885. To a large extent, so the argument goes, shareholders have the freedom to research the management of a corporation before purchasing its stock, and existing shareholders are responsible for electing directors; therefore, diligent shareholders can avoid boards with potential to make bad business by not buying or voting. *Id.*

[132] *Id.* at 886. Otherwise, hindsight could hold business decisions to an impossibly high standard, making legitimate, informed strategies appear reckless in retrospect. *See id.* ("[A] reasoned decision at the time made may seem a wild hunch viewed years later against a background of perfect knowledge.").

[133] *See id.* Many times, the greatest opportunity for large shareholder gains involves a high risk of loss; thus, because shareholders can reduce their overall risk by diversifying their investments, the law should favor—and encourage—risky business decisions, even if they frequently lead to significant losses. *Joy*, 692 F.2d at 886.

[134] *See* Marsili v. Pac. Gas & Elec. Co., 124 Cal. Rptr. 313, 320–21 (Ct. App. 1975) (concluding that a donation made by a utility to a group advocating the defeat of a ballot measure had a business purpose because the measure, if passed, would have increased the utility's tax burden significantly); Thomas W. Joo, *Corporate Governance and the Constitutionality of Campaign Finance Reform*, 1 ELECTION L.J. 361, 368 (2002).

judgment rule will shield these decisions as matters of business discretion.[135]

### 2. The Doctrine of Waste

One component of the fiduciary duty of care is a responsibility not to waste a corporation's assets.[136] To prevail on such a claim, shareholders must demonstrate that a corporation has relinquished corporate assets and received so little consideration in return that the exchange falls "beyond the range at which any reasonable person might be willing to trade."[137] For example, if a director donates corporate funds to a political campaign, but the corporation receives enough consideration such that the exchange does not constitute "squandering" or "giving away" corporate assets (through the potential for favorable policies or legislation), the shareholders' claim would fail under the waste standard.[138]

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[135] *See* Stern v. Gen. Electric Co., 837 F. Supp. 72, 77 (S.D.N.Y. 1993), *aff'd*, 23 F.3d 746 (2d Cir. 1994) (per curiam); *Marsili*, 124 Cal. Rptr. at 319–21; Winkler, *supra* note 13, at 1264. In general, it is difficult to argue that donating to political campaigns is a product of a rational business judgment because the likelihood of getting tangible returns on such disbursements is inherently speculative. *See* Webb, *supra* note 37. *But cf. Stern*, 837 F. Supp. at 79.

[136] *See* Orloff v. Shulman, No. Civ. A.852-N, 2005 WL 3272355, at *11 n.75 (Del. Ch. Nov. 23, 2005) (citing Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997)) (reaffirming the standard for measuring corporate waste); *Lewis*, 699 A.2d at 336 ("Roughly, a waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade."). An alternative formulation for the waste standard has been discussed and reaffirmed in recent cases, as well. Hampshire Grp., Ltd. v. Kuttner, C.A. No. 3607-VCS, 2010 WL 2739995, at *35 n.299 (Del. Ch. July 12, 2010) (internal citations omitted) ("'[W]here business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose.'" (quoting *Disney*, 906 A.2d at 74)).

[137] *See Lewis*, 699 A.2d at 336. *But see* Stern v. Gen. Electric Co., 924 F.2d 471, 476 (2d Cir. 1991) (discussing the standard for corporate waste under New York state law, requiring a showing of fraud or bad faith). In *Stern v. General Electric Co.*, the U.S. District Court for the Southern District of New York granted summary judgment for the directors of General Electric (GE) against a shareholder claiming waste of corporate funds in establishing and administering GE's political action committee. 837 F. Supp. at 77. In addition to employing a substantively different waste standard than that used in Delaware (requiring fraud or bad faith), the court in *Stern* also required that plaintiff-stockholders show that directors intended to serve an outside interest in committing waste. *Id.* at 76 (citing Aranoff v. Albanese, 446 N.Y.S.2d 368, 370 (App. Div. 1982)). This suggests that the New York plaintiff in *Stern* would have needed to show some director self-interest to prevail; in contrast, a similar claim in Delaware would presumably be framed as a separate claim of violation of the duty of loyalty. *See id.*; *infra* notes 139–149 and accompanying text.

[138] *Stern*, 837 F. Supp. at 77; *Disney*, 907 A.2d at 693, 748–49; *see* Winkler, *supra* note 13, at 1264–65. As the Delaware Chancery Court pointed out in *In re The Walt Disney Co. Derivative Litigation*, however, this situation could give rise to liability outside the corporate waste context, perhaps for violations of the duties of care or loyalty, both of which could be sup-

### 3. The Duty of Loyalty

Consistent with the imbalance of power that gives rise to the fiduciary relationship between management and shareholders, the duty of loyalty requires that corporate management place the best interests of the corporation before its own.[139] In this way, the duty creates widespread trust in the marketplace for capital, decreasing inefficiencies by reducing the need of shareholders to incur monitoring or supervision costs.[140] Specifically, this obligation generally requires that board decisions be made by independent directors and that those directors carry out their duties in good faith, free from self-interest.[141]

Conflicts of interest often arise in the context of common business transactions, such as mergers or acquisitions.[142] During such deals, a winning outcome for the director may be a losing outcome for the corporation and its shareholders, thus resulting in a conflict of interest.[143] Another scenario that could give rise to loyalty concerns is the receipt by a fiduciary of a personal benefit flowing from a particular position of power.[144] For example, if a director designates a particular sum of corporate money for a political advocacy group led by a close friend, this might give rise to a violation of the duty of loyalty claim; the director would be exploiting a position of power to the detriment of the share-

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ported by the presence of bad faith. 907 A.2d at 749 n.422; *see* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

139 Mitchell & Mitchell, *supra* note 116, at 172.

140 *See id.* at 172–73.

141 *See id.* In *Lyondell Chemical Co. v. Ryan*, the Delaware Supreme Court issued one of its most recent opinions on the state of fiduciary law in Delaware. *See* 970 A.2d at 243–44. Because Lyondell's certificate of incorporation included a provision insulating its directors from duty of care suits under section 102(b)(7), the court was limited to addressing potential duty of loyalty violations. *Id.* at 239; *see also* Del. Code Ann. tit. 8, § 102(b)(7) (Supp. 2010). Shareholders claimed that the directors breached their duty in failing to maximize the price of a merger accepted by the board, and were motivated by their own self interest (through cash received for their stock options) to complete the transaction. *Lyondell*, 970 A.2d at 239. But the trial court resolved that the board was not "motivated by self-interest or ill will"; therefore, the decision fails to provide further insight into how Delaware courts might treat self-interested political donations. *See id.*

142 *See, e.g.*, *Unocal*, 493 A.2d at 954.

143 *See* Bayer v. Beran, 49 N.Y.S.2d 2, 6 (App. Div. 1944). For example, if a director sitting on the board of company *X* owned target company *Y*, it would be in that director's interest to maximize the sale price of *Y* which, in turn, would directly conflict with the interests of the shareholders of *X* (whom the director represents as a fiduciary), who would seek the lowest possible price for *Y*. *See id.*

144 *Disney*, 907 A.2d at 751 ("The classic example that implicates the duty of loyalty is when a fiduciary . . . receives a personal benefit not shared by all shareholders." (citing Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 362 (Del. 1993))).

holders—whose interests that director has a fiduciary obligation to represent.[145]

When directors abuse positions of power to further their own political or social views, shareholders could respond by alleging a violation of the duty of loyalty.[146] From a doctrinal standpoint, this particular analysis is not generally limited by the business judgment rule.[147] In other words, directors engaged in making self-interested political contributions using funds from a corporation's general treasury do not enjoy a presumption that their dealings are fair.[148] Rather, it is incumbent upon those directors to prove the good faith of the transaction and to show that it is fair to the corporation and its shareholders.[149]

#### 4. Delaware Statutory Law

Beyond the jurisprudence of the Delaware courts, that state's legislature has also shaped shareholder remedies flowing from fiduciary duty violations.[150] Section 102(b)(7) of Delaware's General Corpora-

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[145] *See Disney*, 907 A.2d at 751; Tobin, *supra* note 66.

[146] *See Bellotti*, 435 U.S. at 795 ("[M]inority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management."); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After* Citizens United, 89 N.C. L. Rev. 1197, 1228–29 (2011); Brian Stelter, *Candidates Running Against, and with, Cable News*, N.Y. Times, Oct. 24, 2010, at A24; Tobin, *supra* note 66 (discussing News Corporation CEO Rupert Murdoch's recent donation of corporate funds to then-candidate for Ohio Governor John Kasich arising out of "friendship" with the candidate). These claims have also been made by conservatives against corporate leaders supporting the Democratic Party. Allen, *supra* note 28. For example, the President of FreedomWorks—a million-member Tea Party group—recently criticized Jim Rogers, the CEO of Duke Energy, for using company funds to attract the Democratic National Convention to Duke's home city of Charlotte, North Carolina: "'Jim Rogers may like cozying up to Barack Obama to suit his own political appetites, but in his role as head of Duke Energy it is completely inappropriate and unacceptable . . . .'" *Id.*

[147] *See Bayer*, 49 N.Y.S.2d at 6.

[148] *See Bellotti*, 435 U.S. at 795; *Bayer*, 49 N.Y.S.2d at 6.

> Such personal transactions of directors with their corporations, such transactions as may tend to produce a conflict between self-interest and fiduciary obligation, are, when challenged, examined with the most scrupulous care, and if there is any evidence of improvidence or oppression, any indication of unfairness or undue advantage, the transactions will be voided.

*Bayer*, 49 N.Y.S.2d at 6–7.

[149] *See Bayer*, 49 N.Y.S.2d at 6; Yosifon, *supra* note 146, at 1229 ("[W]here directors spend on behalf of causes that are pet projects . . . then corporate law provides a remedy through shareholder derivative suits that put the onus on directors to demonstrate that "interested" transactions were entirely fair to the corporation and its shareholders.").

[150] *See* Del. Code Ann. tit. 8, § 102(b)(7) (Supp. 2010).

tion Law allows corporations to insulate directors from monetary liability for duty of care violations by including a provision to that effect in their charters.[151] Alternatively, corporations may agree to purchase liability insurance for directors as part of their compensation package.[152] The result of these practices is that the costs of duty of care violations are ultimately borne by the corporation and its shareholders, either through paying insurance premiums or by suffering the results of egregious incompetence or intentional failures in managerial decision making without meaningful recourse.[153]

An important caveat to this rule, however, is that section 102(b)(7) only applies to *directors* and does not protect officers or other corporate managers from liability.[154] Furthermore, in 2009 the Delaware Supreme Court held explicitly in *Gantler v. Stephens* that corporate officers owe the same fiduciary duties to shareholders that directors do.[155] Therefore, it is possible that a claim of corporate waste brought against a group of directors and officers could be partially dismissed pursuant to section 102(b)(7), with the claims against the corporate officers surviving under the rationale set forth in *Gantler*.[156]

A second important statute adopted by the Delaware legislature permits shareholders to inspect the books and records of a corporation

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151 *See id.*; *Lyondell*, 970 A.2d at 239.

152 *See* § 102(b)(7).

153 *See Lyondell*, 970 A.2d at 243–44; *Stone*, 911 A.2d at 370.

154 *Gantler*, 965 A.2d at 709 n.37 ("Under . . . § 102(b)(7), a corporation may adopt a provision in its certificate of incorporation exculpating its directors from monetary liability for an adjudicated breach of their duty of care. Although legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers."); *see also* Berger, *supra* note 116, at 664–65. At a recent corporate law symposium, law professors asked Justice Berger of the Delaware Supreme Court why plaintiff-shareholders had not seized the opportunity to include corporate officers as defendants in derivative suits; Justice Berger replied: "I don't know. I have no idea why they're not doing it, other than that's not part of the game plan that everybody is accustomed to, which is kind of a lame answer, but that's the only way I can explain it." *Id.*

155 *See Gantler*, 965 A.2d. at 708–09 ("In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold." (citations omitted)).

156 *See id.* at 709 n.37. This situation assumes that waste claims would fall under the broader duty of care, but the Delaware Chancery Court has held that whether a waste claim will be exculpated under section 102(b)(7) depends on whether the claim includes allegations implicating the duty of loyalty, such as a personal benefit. *See* Green v. Phillips, Civ. Action No. 14436, 1996 WL 342093, at *6–7 (Del. Ch. June 19, 1996) (dismissing a claim for waste under section 102(b)(7) because the plaintiff failed to allege self-interest or bad faith). For example, if a director makes a wasteful political donation for personal or ideological reasons, the director would not be immunized under section 102(b)(7). *See id.*

in certain circumstances prescribed by section 220 of the Delaware Code.[157] Specifically, after making a written demand, shareholders have the right to inspect and make copies of a corporation's stock ledger, list of stockholders, and "other books and records."[158] Shareholders must, however, have a "proper purpose" for such an investigation, defined by statute as a purpose reasonably related to the shareholder's interest as a shareholder.[159] Before shareholders can bring any claim against management for violating their fiduciary duties by donating company money to political campaigns, obtaining thorough, reliable evidence of that wrongdoing is absolutely necessary.[160] Given the meager disclosure requirements currently in force in the United States and the demonstrably lower rates of voluntary disclosure of sources of political campaign support in recent years,[161] section 220 gives shareholders precisely the tool they need to uncover details of suspected wrongdoing if and when it occurs.[162]

## III. Fiduciary Law Is the Best Way to Reduce Harmful Political Spending Post-*Citizens United*

During the summer of 2010, news broke that the media corporation News Corporation (News Corp.) contributed $1 million from its corporate treasury to the Republican Governors Association (RGA) per CEO Rupert Murdoch's wishes;[163] this raised the specter of fiduciary duty violations to News Corp.'s shareholders.[164] When asked about the

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[157] *See* Del. Code Ann. tit. 8, § 220 (Supp. 2010); Berger, *supra* note 116, at 663 n.9.

[158] § 220(b)(1).

[159] § 220(b). In the context of shareholder investigations into corporate wrongdoing, the Delaware Supreme Court has interpreted this standard as follows: "[A]ssuming the allegation is meritorious, the stockholder should be given enough information to effectively address the problem, either through derivative litigation or through direct contact with the corporation's directors and/or stockholders." Saito v. McKesson, 806 A.2d 113, 115 (Del. 2002).

[160] *See* § 220(b); *Saito*, 806 A.2d at 115; Berger, *supra* note 116, at 663.

> But what's going on [with section 220] is that, on the one hand, if our courts are not open to stockholders because we're just there for management, then we're not doing our job and we're not good for anybody. That may be nice for the companies, but the stockholders are not going to stand for it and the repercussions would be severe.

Berger, *supra* note 116, at 663.

[161] Although disclosure rates may increase if the current patterns observed in the 2012 election cycle continue through November. *See supra* notes 79–82 and accompanying text.

[162] *See* § 220(b); *Saito*, 806 A.2d at 115; *supra* notes 74–78 and accompanying text.

[163] Tobin, *supra* note 66; *see* Stelter, *supra* note 146.

[164] *See* Tobin, *supra* note 66.

donation, Murdoch explained: "The RGA [gift] was actually [a result] of my friendship with John Kasich[,]" then-candidate, now-Governor of Ohio.[165] When a News Corp. spokesperson was asked about the donation, however, he defended the donation as support for the RGA's "pro-business agenda."[166] Later that year, it was revealed that the media corporation had also contributed $1 million to the U.S. Chamber of Commerce ("the Chamber") during the summer leading up to the 2010 elections.[167] But because the Chamber is classified as a 501(c) non-profit organization, it was not required by law to reveal the identity of its supporters.[168]

Recent statistics suggest that situations like that described above may become more and more common in the United States after the U.S. Supreme Court's 2010 decision in *Citizens United v. FEC.*[169] Whether and how shareholders respond to personally motivated or wasteful corporate political spending could have a significant impact on political spending practice, and could very well protect the value of their ownership interest.[170] Drawing upon survey data of directors of many of the largest, most influential American corporations, Section A of this Part argues that, when corporations engage in political speech, they usually harm shareholder value.[171] Next, Section B discusses why the internal mechanisms of shareholder involvement in political speech decisions as they currently stand are inadequate to ensure that shareholder value remains management's chief concern.[172] Finally, in light of the preceding considerations, Section C concludes that claims based

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[165] *Id.*

[166] Ben Smith, *News Corp. Gave Pro-GOP Group $1M*, POLITICO (Sept. 30, 2010, 9:19 PM), http://www.politico.com/news/stories/0910/42989.html. Beyond the apparent inconsistency of these two statements, it is also unclear why News Corp. would choose not to report the donation. *Id.* It is similarly unclear why the company would be reluctant to disclose the donation if it truly had the salutary objective of fostering "pro-business" policies and legislation. *See id.*

[167] *Id.*

[168] Alexander Mooney, *Report: News Corp. Gave $1M to Chamber of Commerce*, CNN POLITICS (Oct. 1, 2010, 10:59 AM), http://politicalticker.blogs.cnn.com/2010/10/01/report-news-corp-gave-1m-to-chamber-of-commerce/; *see also supra* notes 74–78 and accompanying text.

[169] *See* 130 S. Ct. 876, 886 (2010); *supra* notes 69–78 and accompanying text.

[170] *See* Webb, *supra* note 37. Merely investigating and pursuing shareholder suits could also accomplish this particular goal, regardless of the ultimate outcome of the case; this possibility will be discussed in greater detail *infra*. *In re* The Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006); Berger, *supra* note 116, at 661 (describing the trial Disney directors endured as an "intermediate step" between finding and not finding liability).

[171] *See infra* notes 174–189 and accompanying text.

[172] *See infra* notes 190–211 and accompanying text.

on violation of fiduciary duties (specifically, waste and loyalty suits) represent the most useful legal tools currently available to shareholders for promoting directorial transparency and accountability regarding corporate political speech decisions.[173]

### A. *Political Donations Are Rarely in the Best Interests of the Corporation and Its Shareholders*

Despite the longstanding entrenchment of shareholder primacy in American corporate law, most often a corporation's donations to candidates for political office will not increase shareholder value.[174] And at worst, a contribution has the potential to gravely *hurt* a corporation's stock price (as was the case for Target in the summer of 2010).[175] To be sure, some corporate donations to political causes truly have a specific business goal in mind.[176] This Section argues that generally, however, they do not.[177] The familiar justification for political donations offered by management is that the corporation only supports candidates for public office who, if elected, will promote favorable policies for their business in the areas of taxation, labor standards, or environmental regulation, just to name a few.[178] Empirical research, combined with some directors' and shareholders' personal views suggests, however, that this claim lacks support in practice.[179]

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[173] *See infra* notes 212–241 and accompanying text.

[174] *See* The Ctr. for Political Accountability & Zicklin Ctr. for Bus. Ethics Research, The Wharton Sch., Nationwide Survey of Members of Corporate Boards of Directors: Attitudes Towards and Awareness Of: Campaign Finance Laws, Corporate Oversight of Political Spending and Activity, and Proposed Reforms 6 (2008) [hereinafter Nationwide Survey], *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/919. In a 2008 survey, 255 members of boards of directors of Russell 2000 companies were interviewed and asked about their opinions with regard to corporate political spending. *Id.* When asked whether their company or industry's political advocacy and spending resulted in favorable legislative, regulatory, or tax treatment, a mere twenty-nine percent responded in the affirmative. *Id.*

[175] *See* Webb, *supra* note 37.

[176] *See, e.g.*, Marsili v. Pac. Gas & Elec. Co., 124 Cal. Rptr. 313, 317, 321 (Ct. App. 1975) (involving a $10,000 corporate contribution to a group advocating against a ballot measure that would have increased the company's taxes by over $1 million annually).

[177] *See infra* notes 178–189 and accompanying text.

[178] *See* Allen, *supra* note 28; Mooney, *supra* note 168; Tobin, *supra* note 66. Even in his apology for damaging Target's reputation and bottom line, Target's CEO Greg Steinhafel offered this familiar refrain in support of the donation: "The intent of our political contribution to MN Forward was to support economic growth and job creation." Scheck, *supra* note 39.

[179] *See* Nationwide Survey, supra note 174, at 6 (discussing directors' opinions); Rajesh K. Aggarwal et al., Corporate Political Donations: Investment or Agency? 21 (Jan. 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=972670; Jeffrey M.

Analysis of the traditional justification for political donations reveals how attenuated the relationship between donations and favorable treatment of businesses really is.[180] Take Target's donation to MN Forward as an example: first, the company decided to support a particular advocacy group allegedly based on its mission and policy goals; second, that group used the funds to support certain candidates running for public office; third, these funds, often spent on advertisements, failed to influence voting behavior and the candidate was not elected; and finally, even if MN Forward's candidate had been elected, he still may not have voted according to the wishes of his corporate supporters.[181] Additionally, even if the candidate *had* been elected and had furthered Target's desired policies, there would still be substantial risk of consumer fallout, particularly because the candidate held controversial political and social views.[182]

Furthermore, because the law generally does not discriminate between competitors within a particular industry, any policies that are "pro-business" will often inure both to the benefit of the contributing corporation as well as to that corporation's biggest rivals.[183] It should also be noted that many corporations donate general treasury funds to organizations supporting both political parties, presumably in order to "hedge" their bets in hopes of currying favor with whichever party controls the federal or state offices most affecting a corporation's business.[184] Companies that engage in this practice raise serious doubts

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Drope & Wendy L. Hansen, *Futility and Free Riding: Corporate Political Participation and Taxation Rates in the United States*, 10 Bus. & Pol., no. 3, 2008, art. 2, at 17 (finding no evidence that political donations are investments in political capital and that donations are negatively correlated with returns); Aggarwal, *supra* note 27 ("[M]ost studies have actually found a very weak relationship, or none at all, between political contributions and floor votes in Congress."); *see also* The Ctr. for Political Accountability, Corporate Political Spending: A Survey of American Shareholders 17 (2006) [hereinafter Survey of American Shareholders], *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/918 (finding that 67% of shareholders surveyed believed large political contributions and heavy spending on lobbying efforts were inappropriate and that 79% of shareholders disapproved of corporate political contributions that support special interest groups with social agendas that have nothing to do with issues that impact the corporation's business or shareholder value).

[180] *See* Aggarwal et al., *supra* note 179, at 21.

[181] *See id.*

[182] *See* Aggarwal, *supra* note 27 (describing a corporation's decision to support a specific candidate in an election as "choosing to enter a minefield").

[183] *See* Aggarwal et al., *supra* note 179, at 21. In this scenario, the competitors will enjoy the same favorable regulatory environment as the donor, but the donor will foot the bill. *See id.*

[184] *See, e.g.*, Brody Mullins & Alicia Mundy, *Corporate Political Giving Swings Toward the GOP*, Wall St. J., Sept. 21, 2010, at A5. For example, during the first half of 2009, AT&T

about whether they are truly, as they claim, supporting candidates with "pro-business agendas."[185]

Besides the questionable nature of what benefit a corporation ultimately may receive in exchange for a political contribution, many shareholders believe that corporate directors and officers frequently pledge corporate funds for ideological or personal reasons, rather than to promote the best interests of the corporation's stockholders.[186] In fact, a 2006 survey asked 800 Americans owning stock or mutual funds whether they believed that corporate management contributes company funds to advance their own private, political interests rather than the interests of the company and its shareholders.[187] Troublingly, seventy-three percent of those surveyed agreed, and nearly half "strongly agreed."[188] Whether this perception accurately reflects the actual political spending practices of corporate leaders is up for debate; yet, this data shows quite clearly the suspicion with which shareholders viewed political donations four years before *Citizens United* and more broadly reflects modern shareholders' disenchantment with corporate participation in the political arena.[189]

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donated its $1.1 million in PAC contributions equally between Republican and Democratic candidates. *Id.*

[185] Francis Bingham, Note, *Show Me the Money: Public Access and Accountability After* Citizens United, 52 B.C. L. Rev. 1027, 1055 (2011); *see* Winkler, *supra* note 13, at 1265 (discussing management's "attempt to open a candidate's eyes to corporate needs" as a characterization of purchasing political influence). Assuming that corporations seek returns on their donations through favorable regulatory, tax, or environmental policies, donating equally to both parties shows that promoting a particular candidate's policies are not really what these corporations are after. *See id.* Rather, donation "hedging" implies that, whichever candidate wins, the corporation hopes to use their support as leverage to influence that official's voting behavior. *See id.* This argument was made explicitly—and successfully—by the directors of GE in *Stern v. General Electric Co.*, in the context of donations made to unopposed or strongly favored candidates: "the benefits derived . . . include . . . the election of candidates open to GE's position on various issues; and the maintenance and improvement of GE's relationship with members of Congress." 837 F. Supp. 72, 77 (S.D.N.Y. 1993), *aff'd*, 23 F.3d 746 (2d Cir. 1994). This practice suggests that GE's board was more concerned with donating to candidates who would ultimately be elected, rather than those who would support pro-business policies. *See id.*

[186] *See* Survey of American Shareholders, *supra* note 179, at 19; Tobin, *supra* note 66.

[187] Survey of American Shareholders, *supra* note 179, at 19.

[188] *Id.*

[189] *See id.* It is possible that shareholders' heightened alert to conflicts of interest has been at least partially motivated by recent instances of alleged self-serving by corporate executives. *See* Mooney, *supra* note 168.

### B. *Internal Mechanisms of Corporate Governance Are Inadequate to Protect Shareholder Value*

As discussed in Part II, one way in which shareholders may respond to wasteful or self-interested political spending is by using the traditional outlets of internal corporate governance.[190] In practice, however, these tools offer shareholders little opportunity to meaningfully influence corporate policies and decision making.[191] Corporate law scholars have proposed amendments to corporate governance rules to address the expressive concerns raised in *Citizens United*.[192] Their proposals offer another path toward promoting directorial accountability for political speech decisions and highlight the serious inadequacies of the internal corporate governance tools currently available to shareholders.[193] These scholars observe that current, default corporate law rules treat decisions to engage in political spending as ordinary business decisions, subject to the presumptive weight of the business judgment rule.[194] Therefore, shareholders have no way to actually participate in these decisions whatsoever: they usually may not vote or submit a proposal to limit or prohibit these donations, and they do not enjoy the benefit of mandatory disclosure rules when these contributions are made.[195]

Furthermore, the argument that shareholders can control political speech decisions through the election of directors is also somewhat illusory.[196] First, although shareholders must have access to sufficient information regarding a corporation's activity in this area to cast an informed vote, current disclosure rules make dissemination of this information optional, not mandatory.[197] Second, this argument assumes that shareholders are "one-issue voters."[198] For example, a shareholder may be unhappy with the political speech decisions a director has made

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[190] *See supra* notes 90–113 and accompanying text.

[191] *See* Bebchuk & Jackson, *supra* note 12, at 87–88.

[192] *See id.* at 97–107. Namely, these concerns surround the compulsion of shareholders to speak (through political donations) in ways with which they might not otherwise. *See id.*

[193] *See id.* at 87–89.

[194] *See id.* at 87.

[195] *See id.*; *see also* SEC Shareholder Proposals Rule, 17 C.F.R. § 240.14a-8 (2011).

[196] *See* Bebchuk & Jackson, *supra* note 12, at 100.

[197] *See id.* at 104–05. A caveat, as discussed *supra*, could be a books and records action. *See* Del. Code Ann. tit. 8, § 220 (Supp. 2010). In a sense, this option could counteract the unwillingness of a corporation to disclose the details of its political endeavors, providing shareholders with an internal source of information that would otherwise be shielded from public view. *See id.*

[198] *See* Bebchuk & Jackson, *supra* note 12, at 100.

but believe that the director has otherwise done a good job.[199] In this scenario, the shareholder would be forced to decide whether those decisions outweigh the otherwise positive performance of the director; director elections, in other words, do not address specific political speech issues in a targeted, precise way.[200] The result is that many critical decisions (with both expressive and business importance) are left wholly unsupervised and uninformed by shareholder preferences, allowing competition with other companies making political donations and self-dealing to seriously compromise the financial well-being of a company.[201]

Scholars argue that corporate law should accommodate the prerogatives of shareholders *and* management by expanding shareholder voting rights to better align the speech and business interests of the two groups.[202] For example, one such proposal introduced in Congress would require a corporation to obtain shareholder approval for political contributions in excess of $50,000.[203] Some scholars argue that this form of regulation, although positive, would fail to account for the expressive component of corporate political speech because shareholders would still be unable to directly affect political spending decisions below that threshold.[204]

This particular shortcoming also reveals why fiduciary law would be poorly suited to serving shareholders' more nuanced, expressive viewpoints.[205] In a sense, waste or loyalty suits would act as much more

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[199] *See id.*

[200] *See id.*

[201] *See* Lotterman, *supra* note 30; Webb, *supra* note 37. What is even more troubling is that many large corporations today leave these political speech decisions to lower-level management; in fact, a recent study revealed that only one-third of the 100 largest companies in the United States require political contributions to be approved by a company's board of directors, up from less than one percent just two years before. *See* Bebchuk & Jackson, *supra* note 12, at 88. As Target learned firsthand, these highly charged decisions should not be left to management, given the catastrophic repercussions they could have on a corporation's financial stability. *See id.* (citing Bruce F. Freed & Jamie Carroll, Open Windows: How Codes of Conduct Regulate Corporate Political Spending and a Model Code to Protect Company Interests and Shareholder Value 15 & n.18 (2007)).

[202] *See* Bebchuk & Jackson, *supra* note 12, at 111.

[203] *See id.* at 98 (citing the Shareholder Protection Act of 2010, H.R. Rep. No. 111-620, pt. 1, at 2 (2010)). Rules like this have been in place in the United Kingdom for over a decade and studies conducted after that legislation was adopted showed that spending fell following its adoption. *Id.* (citing Political Parties, Elections and Referendums Act, 2000, c. 41, §§ 139–140 (U.K.)).

[204] *See id.* at 99.

[205] *See id.*

"blunt" weapons against the rise of corporate political spending.[206] Because shareholders could avail themselves of fiduciary law only when political speech decisions bear little to no relation to the business interests of the corporation, this tool would not be sensitive enough to capture any *expressive* dissatisfaction shareholders might have with these contributions on a case-by-case basis, or before they are actually made.[207]

Despite this admitted shortcoming, fiduciary suits offer several advantages that could greatly reduce the level of divergence between shareholders and management with respect to political speech decisions.[208] If successful, shareholders would obtain a voice in the board room, rather than in a more reactive setting, such as in a shareholder vote before a contribution is made.[209] Furthermore, as scholars point out in support of enhanced voting rights, fiduciary duty suits would not necessarily reduce the quantity of a corporation's political activity.[210] Rather, such suits would ensure that decisions to support political causes are truly aligned with shareholder interests, which directors are charged with promoting.[211]

### C. *Fiduciary Law Represents the Best Shareholder Tool Currently Available to Respond to Wasteful or Self-Interested Political Spending*

Given the present inadequacy of internal mechanisms of shareholder control over the American corporation, fiduciary law represents the best way to ensure managerial accountability when companies support political campaigns.[212] Engrained in the American tradition of corporate law is the notion that corporations exist for the purpose of serving their shareholders by generating wealth by increasing the value of their residual shares of ownership in the firm.[213] Indeed, legal rules

[206] *See* MITCHELL & MITCHELL, *supra* note 116, at 136–37.

[207] *See* Bebchuk & Jackson, *supra* note 12, at 99. These suits, however, would have the advantage of focusing on one particular issue—political spending—and therefore would offer a more sensitive approach than other remedial tools, such as voting for new directors, voting to eliminate political speech altogether, or selling shares. *See id.*

[208] *See id.*

[209] *See id.* at 101 (acknowledging the objection that shareholder voting could produce wasteful transaction costs as more and more issues are reserved for shareholder approval rather than being entrusted to directorial discretion).

[210] *See id.* at 111. It seems likely, however, that successful suits would at least limit the growth of such spending in the years following *Citizens United*. *See id.*

[211] *See id.*

[212] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 (1978); Epstein, *supra* note 34, at 656 (observing that it is an "open question" whether corporate political contributions may violate directors' fiduciary duties).

[213] *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

such as limited liability and perpetual existence were created to further this very goal.[214] When corporations reach beyond this fundamental objective, however, and use capital obtained from shareholders to expand their influence in largely nonbusiness enterprises, directors should be held to answer for their decisions' harmful effects.[215] Present corporate law rules could provide redress for shareholders aggrieved by this form of managerial misconduct and ensure that shareholder value remains the core concern of corporate leadership.[216]

First, shareholders could argue that political donations are effectively a waste of corporate assets.[217] Delaware courts have held that shareholders must allege an "exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration."[218] An alternate formulation of this test has also been affirmed in recent Delaware decisions that hold that "where business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose . . . ."[219] In either case, the controlling issue will be whether the possibility of favorable business policies in the future represents sufficient consideration to sustain the transaction.[220] In any other business setting, such an illusory return would almost never justify such use of corporate funds.[221]

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[214] Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658–59 (1990).

> State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

*Id.* (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).

[215] *See Bellotti*, 435 U.S. at 795.

[216] *See infra* notes 217–241 and accompanying text.

[217] *See In re* The Walt Disney Co. Derivative Litig., 907 A.2d at 693, 748–49 (Del. Ch. 2005); Epstein, *supra* note 34, at 656.

[218] *Disney*, 907 A.2d at 693, 748–49 (citations omitted).

[219] Hampshire Group, Ltd. v. Kuttner, C.A. No. 3607-VCS, 2010 WL 2739995, at *35 n.299 (Del. Ch. July 12, 2010) (citing *Disney*, 906 A.2d at 74). Presumably, this refers to situations that do not involve allegations of self-interest or duty of loyalty violations, which are generally not subject to the deferential business judgment rule. *See id.*

[220] *See id.*

[221] *See id.* It is also worth noting that corporate political contributions are easily distinguishable from corporate donations to charity, which are deemed permissible under Delaware statutory law. *See* DEL. CODE ANN. tit. 8, § 122(9) (Supp. 2010). Returning to the ex-

One recent case from the Delaware Court of Chancery provides guidance on the Delaware courts' treatment of the corporate waste doctrine.[222] In the 2009 case *In re Citigroup Inc. Shareholder Derivative Litigation,* the Chancery Court refused to dismiss the shareholder-plaintiffs' claim of corporate waste for agreeing to a multi-million dollar compensation package for the company's outgoing CEO.[223] *Citigroup* offers hope for shareholders wishing to challenge corporations' use of general treasury funds to support political endeavors because these donations resemble ordinary business decisions even less than the allegedly wasteful conduct of the directors in *Citigroup*—paying its employees.[224] In return for compensating a CEO, a corporation (usually) receives the services of a highly educated, highly qualified, accomplished business leader—a benefit received by that corporation alone.[225] In contrast, a corporation that donates to a political advocacy group receives nothing more than a lottery ticket; even worse, this ticket carries extremely remote chances of paying out a tangible return, and also carries a significant risk of inflicting damage to that company's reputation.[226] And even if the ticket pays off and pro-business policies are enacted, the corporation will likely be forced to share these winnings with its fiercest competitors.[227]

Shareholder challenges to a corporation's political contributions could also take the form of duty of loyalty claims.[228] When officers or directors exploit their positions of power to further their own political or personal interests, this should be a plain violation of their fiduciary

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ample discussed in Part I.A., if Target's management had pledged corporate funds to the American Red Cross rather than MN Forward, it is highly unlikely that its customers would have boycotted Target's stores because of this decision. *See supra* notes 29–49 and accompanying text. On the contrary, this type of "safe," humanitarian act could very well benefit Target's public image and portray it as a "good citizen," in turn enhancing its brand and strengthening its business. *See* Press Release, Target Corp., Target Donates $200,000 to American Red Cross for Tornado Relief (Apr. 29, 2011), http://pressroom.target.com/pr/news/target-donates-200-000-to-american-202464.aspx.

[222] *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 138–39 (Del. Ch. 2009); *see* Steven Caywood, Note, *Wasting the Corporate Waste Doctrine: How the Doctrine Can Provide a Viable Solution in Controlling Excessive Executive Compensation*, 109 Mich. L. Rev. 111, 118–19 (2011); Renee M. Jones, *The Role of Good Faith in Delaware: How Open-Ended Standards Help Delaware Preserve Its Edge*, 55 N.Y.L. Sch. L. Rev. 499, 520–22 (2010/2011).

[223] *Citigroup*, 964 A.2d at 138–39.

[224] *Id.*

[225] *See id.*

[226] *See* Aggarwal, *supra* note 27.

[227] *See* Aggarwal et al., *supra* note 179, at 21.

[228] *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243–44 (Del. 2009); Yosifon, *supra* note 146, at 1228–29.

obligations to a corporation's shareholders.[229] Delaware law requires that directors carry out their duties free from self-interested motives.[230] Subordinating the interests of shareholders in a company's growth in favor of a director's own political or social views is not only an abuse of the trust relationship necessary to the proper functioning of the corporation, but it is also a clear violation of Delaware law.[231]

Evidence of the sanctity of the duty of loyalty shines through in section 102(b)(7) of Delaware's corporate code, which makes violations of the duty of loyalty non-exculpable.[232] Section 220, which permits shareholders (armed with a proper purpose) to inspect a corporation's books and records, also provides shareholders with a critical tool necessary to investigate and pursue allegations of corporate wrongdoing.[233] Moreover, Justice Carolyn Berger of the Delaware Supreme Court recently implied that defending a derivative suit—regardless of its outcome—can be a deterrent to managerial overreaching.[234]

Finally, perhaps the best argument in favor of using fiduciary law as a mechanism for promoting directorial accountability is that it can be implemented immediately.[235] Some authors' proposals require legislative action either on the federal or state level.[236] Fiduciary law, on the

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[229] *Lyondell*, 970 A.2d at 243–44.

[230] *See id.*; *see also* Tobin, *supra* note 66.

[231] *See* Allen, *supra* note 28; Tobin, *supra* note 66.

[232] *See* Del. Code Ann. tit. 8, § 102(b)(7) (Supp. 2010); *see also* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). Describing the level of loyalty owed by one copartner to another in the context of corporate opportunity, Judge Benjamin Cardozo famously said: "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty . . . ." *Id.*

[233] *See* Del. Code Ann. tit. 8, § 220.

[234] *See* Berger, *supra* note 116, at 661.

> At least one could argue that what was going on in *Disney* was in the nature of preaching, maybe even that an intermediate step between zero liability and finding liability is that you get a seven-week trial, all of your directors are turned upside down, and you pay attorneys' fees. You really don't want your company to go through that, do you? So, at the end of the day, there was no damage award. But I think the *Disney* trial certainly sent a message in terms of what directors should or shouldn't do with respect to compensation.

*Id.*

[235] *See Bellotti*, 435 U.S. at 795; *Citigroup*, 964 A.2d at 136; Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 Yale L.J. 235, 257–58 (1981).

[236] *See* Bebchuk & Jackson, *supra* note 12, at 97. Four elements of corporate governance could be reformed to increase shareholder participation in corporate political speech decision making: (1) the role of shareholders, (2) the role of directors, (3) the allowance of shareholders to opt out of default arrangements set by the legislature, and

other hand, offers a ready-made vehicle for shareholders to ensure that directors of a corporation are making political speech decisions that are in their best interests.[237] The wheels of the legislative process often move slowly, as often they should.[238] Suits based on waste of assets or violations of the duty of loyalty, however, require no change in the law; in fact, American courts have, for the most part, reaffirmed their importance throughout the past century.[239] The longevity of these types of claims is a testament to fiduciary laws' flexibility, widespread applicability, and absolute necessity to ensure efficient, transparent capital markets.[240] There is no reason why these duties cannot adequately serve the interests of shareholders today—as they have for decades—to protect the value of their investments from managerial self-interest and corporate waste.[241]

## Conclusion

When directors, officers, or managers appropriate funds from a corporation's general treasury to engage in corporate political speech having little or nothing to do with its business development, these individuals violate their fiduciary duties to the company's shareholders. Although directors are traditionally entitled to a presumption that they have satisfied their fiduciary obligations in the course of making ordinary business decisions, voluntarily choosing to engage a corporation in highly divisive public debates rarely furthers a legitimate business interest; for that reason, political activities should fall outside the protection of this general rule. Furthermore, internal mechanisms of shareholder involvement in corporate governance have proved inadequate to quell the rise of these potentially disastrous political donations. For these reasons, an alternate path is needed. Legislative responses to

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(4) the expansion of disclosure requirements to reduce the incidence of concealed contributions made through "'conduit' entities." *See id.* at 97–107.

[237] *See id.* at 110 n.79. ("We note, moreover, that nothing in Justice Kennedy's opinion [writing for the majority in *Citizens United*] suggested that existing mechanisms of shareholder protection could not be strengthened or expanded in the corporate political speech context.").

[238] *See id.* at 107.

[239] *See, e.g.*, *Citigroup*, 964 A.2d at 136; *Meinhard*, 164 N.E. at 546. A caveat to this statement is embodied in two recent cases from the Delaware Supreme Court that appear to raise the bar for plaintiff-shareholders seeking to overcome business judgment presumptions. *See Lyondell*, 970 A.2d at 243–44; *Stone*, 911 A.2d at 370. Whether these cases reflect the settled law in Delaware, however, is far from certain. *See Lyondell*, 970 A.2d at 243–44; *Stone*, 911 A.2d at 370.

[240] *See* Mitchell & Mitchell, *supra* note 116, at 137–38.

[241] *See Bellotti*, 435 U.S. at 795.

the Supreme Court's decision in *Citizens United* may ultimately reduce the need for legal means of redress, but until then, fiduciary law should provide injured shareholders the opportunity to hold corporate leaders accountable when shareholders' faith and trust have been violated.

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